***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

# 75-1100

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

STEVEN POND and
DAVID G. FANELLI,

Appellants.

Docket No. 75-1100

REPLY BRIEF FOR APPELLANT
STEVEN POND

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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I

The Government argues in its brief that to invalidate the warrant used to search and seize the luggage, the misstatement in the affidavit used to obtain the warrant must have been both intentional and material. This is incorrect. United States v. Carmichael, 489 F.2d 983, 988-989 (7th Cir. en banc 1973). United States v. Gonzalez, 488 F.2d 833 (2d

Cir. 1973), is cited improperly by the Government, for in Gonzalez, this Court looked to the issue of materiality when it found the misstatement to be unintentional. A consideration of materiality would not have been necessary if intent had been present. While appellant asserts that both intent and materiality are present in this case, it is necessary to find only one or the other to reverse the judgment.

II

The Governmant argues that a determination as to the intent with which the misstatements were placed in the affidavit was a matter of credibility and that, since the judge believed the agents' testimony, he properly found there was no intent to misstate. To the contrary, issues of intent are resolved by looking at the totality of the circumstances and the actor's own behavior. Morissette v. United States, 342 U.S. 246, 276 (1952); United States v. Barash, 365 F.2d 395, 402 (2d Cir. 1966), cert. denied, 396 U.S. 832 (1967); Devitt and Blackmar, FEDERAL JURY PRACTICES AND INSTRUCTIONS, §13.06 (1970); semble, United States v. Cangiano, 491 F.2d 906, 911 (2d Cir.), cert. denied sub nom. Isola v. United States, 419 U.S. 933 (1974).* Even the cases cited by the Government do not establish that the credibility of witnesses is determinative of the

*If the District Court looked only to credibility, his evaluation of the standard to be applied is incorrect and the case must be remanded for a new hearing.

issue. In United States v. Faruolo, 506 F.2d 490, 493 (2d Cir. 1974), the issue was one of whether there had been a valid consent to search. One of the factual questions to be resolved was whether the agents had said anything to justify Faruolo's fear that if he had not consented to the search, his seventeen year old son would be arrested. On this factual question, there was disputed testimony, and it was necessary for the district judge to make a finding of credibility. This Court agreed with that finding, but then reviewed the other circumstances in the case to determine the issue of consent. The opinion cites United States v. Mapp, 476 F.2d 67, 77 (2d Cir. 1973). Mapp, in turn, cites United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied, 372 U.S. 906 (1963), which articulates that a valid waiver of rights is determined by viewing the totality of the circumstances.

In both United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972), and United States v. Miley, Doc. No. 74-2207, slip opinion 2363, 2384 (2d Cir., March 19, 1975), the issue of consent was necessarily resolved in part by determining which of the witnesses were telling the truth about the circumstances of a search and seizure. This Court was clear about the test to be used:

> ... [T]he credibility of the witnesses is a question for the judge who heard them. United States v. Fernandez, 456 F.2d 638, 640 (2 Cir. 1972); United

> States v. Faruolo, 506 F.2d 490, 493 (2 Cir. 1974). Judge Pollack clearly "[c]onsider[ed] the totality of the circumstances" in determining that consent was voluntary and knowing, United States v. Mapp, 476 F.2d 67, 78 (2 Cir. 1972); see Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973); United States v. Faruolo, supra, 506 F.2d at 493, and we are unwilling to overturn his ruling, which is on "a question of fact to be determined from all the circumstances."
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> Id., slip opinion at 2378.

Here there is no dispute as to the facts. The testimony came from the agents' own mouths, and the issue for resolution was the conclusion to be drawn from the way in which the agents obtained, relayed, and handled the information, and the series of misstatements included in the affidavit presented in support of the application for the search warrant.

The critical misrepresentation here had to do with the assertion that the baggage was of a weight disproportionate to its size. Contrary to the Government's assertion in its brief (see 7), the record shows that the affiant-agent -- Sweikert -- was not told by the Cailfornia agent -- McCravy -- that the weight of the baggage was disproportionate (24*). Thus, the false information came from the affiant-agent. The Government seeks to explain the false assertion by arguing

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*Numerals in parentheses refer to pages of the transcript of the trial.

that the affiant-agent must have mistakenly "amalgamated" the reports of this case with prior cases (Brief at 7). However, the notes kept by Sweikert contemporaneously with his conversation with McCravy contained no reference to disproportionate weight to size.* Further, in light of the length of the train trip from California to New York, the agent had more than sufficient time to ascertain the accuracy of his information.

Moreover, unlike the situation in United States v. LeVecchia, Doc. No. 74-2272, slip opinion 2741 (2d Cir., April 4, 1975), cited by the Government, there were other misstatements in the affidavit here, and whether or not they are material to the probable cause issue, they are part of the circumstances demonstrating that Agent Sweikert loaded the affidavit with half-truths and misstatements calculated to assure the issuance of the search warrant. Thus, as indicated in appellant's main brief, the number of cases in which the informer had been involved was less than the number of cases mentioned in the affidavit;** and, despite the assertion in the affidavit that the informer had

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*The footnote in the Government's brief at 7 indicates that an Assistant United States Attorney participated in the drafting of the affidavit and that even he relied on this misstatement.

**While the affidavit states that the informer had assisted in 40 cases involving marijuana, the actual number of cases in which he had provided information numbered only 25 or 30, not all of those involved marijuana, and the sense of smell was a factor in only 50% of those.

been accurate in similar previous circumstances, there was no prior situation in which the odor of marijuana had been the only factor involved or in which the marijuana was similarly wrapped.

All of these factors are part of the totality of the circumstances, properly considered in an evaluation of the agent's intent. They demonstrate that the misrepresentation was deliberate and substantial, requiring suppression.

III

Relying on United States v. Sultan, 463 F.2d 1066 (2d Cir. 1972), the Government argues that assertions of prior reliability of the informer in the affidavit are sufficient to support issuance of the warrant. However, the affidavit here is devoid of any assertion as to who the informant was or how he obtained his information.*

As the Supreme Court noted in United States v. Harris, 403 U.S. 563, 582 (1971), information concerning the prior reliability of the undisclosed informer does not show the factual basis for concluding that the present information is truthful or reliable. Id. at 582. Here the affidavit

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*Even at the hearing Agent McCravy stated that he did not know how the informer got his information and that in his communications with the informer McCravy never inquired about the source (22, 24). The Judge agreed that there was no statement of the underlying circumstances (73).

provides no substantial basis for crediting the present information. There is no assertion that the affidavit relates to the personal observations of the informer or how the informer came by his information, and there is no assertion of corroboration.

The Government relies on Sultan to argue that a recitation that the informer has been reliable on prior occasions is sufficient to satisfy the requirements for issuance of a search warrant. Such reliance is unjustified in light of Harris' specific statement that such information does not go to the issue of present credibility. Further, the statement in Sultan was not necessary for the decision, since the informer was disclosed, as was the source of his information. The reference in Sultan to United States v. Dunnings, 425 F.2d 836, 839 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970), as articulating the principle that an assertion of prior reliability is enough is also inaccurate, because the affidavit in Dunnings contained a statement that the informant had been present in the apartment where the contraband was stored and that certain of the activity of the defendant Dunnings was corroborated by agents of the Government. Thus, not only did the affidavit contain a statement about prior reliability, the specific basis for crediting the present information, as well as corroboration, was also included. The same is true of United States v. Perry, 380 F.2d 356 (2d Cir.), cert. denied, 389 U.S. 943 (1967), and United

States v. Ramos, 380 F.2d 717 (2d Cir. 1967), also cited in Sultan.

The Government also argues that because United States v. Burke, Doc. No. 72-1021, slip opinion 3571 (2d Cir., May 15, 1975), requires no allegation of prior reliability when the informer is a victim or witness, the affidavit here was valid. However, since what was missing from the affidavit in this case was a statement of the circumstances permitting the magistrate to credit the present allegations, and not a statement concerning prior reliability, Burke, as well as United States v. Miley, supra, slip opinion at 2384, do not affect the decision here.*

*Of course the identity of the informer in this case was not known until the hearing, and thus Burke could not apply to relieve the Government of any obligation before the magistrate.

## CONCLUSION

For the above-stated reasons and the reasons set forth in the main brief for appellant, the judgment below must be reversed, the evidence suppressed, and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 4, 1975

I certify that a copy of this reply brief for appellant Pond has been personally served on the office of the United States Attorney for the Southern District of New York, and that a copy has been mailed to counsel for appellant Fanelli.